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No. 02-194

In the
Supreme Court of the United States

WILLIAM J. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Federal Claims has jurisdiction pursuant to the Tucker Act, 28 U.S.C. 1491, and the Back Pay Act of 1966, 5 U.S.C. 5596, to review the decision to terminate a National Guard technician employed pursuant to 32 U.S.C. 709.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the Court of Federal Claims (Pet. App. 4a-16a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2002. A petition for rehearing was denied on May 6, 2002. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on August 2, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, "comprehensively overhauled the civil service system" to establish a "new framework for evaluating ad-

verse personnel actions against" federal employees. *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (internal quotation marks omitted). Among other things, the CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.*

Chapter 75 of the CSRA specifies the agency processes, as well as administrative and judicial review procedures, available to covered employees. Subchapter I of Chapter 75, 5 U.S.C. 7501-7504, provides that covered employees subjected to certain (less serious) adverse personnel actions are entitled to advance written notice of the proposed action, a reasonable time to answer and present evidence, to be represented by counsel or another representative, and a written decision setting forth the reasons for the action taken. 5 U.S.C. 7503(b). Subchapter II of Chapter 75, 5 U.S.C. 7511-7514, provides similar rights where the adverse action is more serious, such as where it involves removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or more. 5 U.S.C. 7513(b). In addition, Subchapter II provides that any covered employee subjected to those more serious adverse actions "is entitled to appeal to the Merit Systems Protection Board" or MSPB. 5 U.S.C. 7513(d). Adverse MSPB decisions, in turn, are subject to judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). See *Fausto*, 484 U.S. at 446 (discussing CSRA procedures available to competitive service and preference eligible members of the excepted service).

Congress, however, did not make the full panoply of procedural mechanisms available to every federal employee. For example, in *Fausto*, this Court concluded that Congress had accorded "nonpreference members of the excepted service" some procedural protections, such as the right

to be heard by the agency, but had "denied them the right to seek either administrative or judicial review of the agency's final action." 484 U.S. at 446 (discussing Chapter 43, which governs personnel actions taken for unacceptable performance); *id.* at 447 (discussing Chapter 75, which governs actions taken for the "efficiency of the service"). The Court explained that the "comprehensive nature of the CSRA, the attention that it gives to the rights of non-preference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that subchapter." *Id.* at 448.

In 1990, partially in response to this Court's decision in *Fausto*, Congress amended the CSRA by enacting the Civil Service Due Process Amendments Act (1990 Civil Service Amendments), Pub. L. No. 101-376, 104 Stat. 461. Those amendments revised Subchapter II of Chapter 75 to provide administrative and judicial review to additional categories of employees. In particular, the 1990 Civil Service Amendments extended the right to such review to any "individual in the excepted service" (like those at issue in *Fausto*) "not serving a probationary or trial period" or who "completed 2 years of current continuous service" in the relevant position. 104 Stat. 461 (codified as 5 U.S.C. 7511(a)(1)(C)). See also 104 Stat. 462 (codified as 5 U.S.C. 4303(e)(3) (extending appeal rights under 5 U.S.C. 4303(e) to employees "in the excepted service and covered by subchapter II of chapter 75")).

At the same time, Congress chose, by express exclusion, to refuse those procedures to some categories of employees. See 5 U.S.C. 7511(b) (providing that Subchapter II "does not apply to" the listed categories of employees). For example, Congress excluded from Subchapter II any em-

ployee "whose appointment is made with the advice and consent of the Senate," 5 U.S.C. 7511(b)(1); employees in certain "confidential, policy-determining" positions, 5 U.S.C. 7511(b)(2); and employees appointed by the President, 5 U.S.C. 7511(b)(3). The Act "explicitly denies procedural protections" to those employees, the House Report explained, because they "have little expectation of continuing employment beyond the administration during which they were appointed. They explicitly serve at the pleasure of the President or the presidential appointee who appointed them." H.R. Rep. No. 328, 101st Cong., 1st Sess. 5 (1989). Congress also excluded employees of the CIA, the General Accounting Office, and other agencies, 5 U.S.C. 7511(b)(7)-(b)(8), because "a separate statute excludes the employees of these agencies from the normal appeals process." H.R. Rep. No. 328, *supra*, at 5.

Finally, and most relevant here, Congress excluded National Guard technicians from the rights provided by Subchapter II.[1] Section 7511(b)(5) states that "[t]his subchapter," *i.e.*, Subchapter II, "does not apply to an employee * * * who is described in section 8337(h)(1), relating to technicians in the National Guard." The House Report explained that, "while the committee is sympathetic to the pleas for better protection the technicians have made," the committee planned "to address the issue of protection for technicians in separate legislation" to be developed in cooperation with the Committee on Armed Services. H.R. Rep. No. 328, *supra*, at 5. Parallel to Section 7511(b)(5), Section 709 of Title 32 provides that "a right of appeal which may exist with respect to" termination of a

[1] Under Section 709 of Title 32 of the United States Code (entitled "Technicians: employment, use, status"), National Guard technicians are "employee[s] of the Department of the Army or the Department of the Air Force" and "employee[s] of the United States." 32 U.S.C. 709(e).

national guard technician "shall not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709(f)(4).

2. Petitioner, William J. Fleming, was a technician with the Arizona National Guard until the Arizona Adjutant General terminated him pursuant to 32 U.S.C. 709(f)(2) for wrongfully appropriating government property. Pet. App. 5a. While petitioner was a technician, he signed a letter —on Western Army Aviation Training Site letterhead —requesting possession of certain platform utility trucks that were in the Gila Bend target yard. *Ibid.* According to petitioner, the trucks were inoperable, and his supervisor told him to "get rid" of the trucks because they were too small for target practice. Petitioner took five of the trucks home, gave others to his colleagues, and repaired some of the trucks by cannibalizing parts from others. Petitioner also removed the data plates from the trucks. *Ibid.*

On March 19, 1997, petitioner received a "Notice of Proposal to Terminate" from his supervisor, Major Bailey. Pet. App. 5a-6a. The notice alleged that petitioner had misrepresented his command and standing when he used Western Army Aviation Training Site letterhead to acquire the trucks. The notice further alleged that petitioner had taken the trucks home and removed the data plates, showing that petitioner had no intention of returning the trucks. *Id.* at 6a.

Petitioner, though his attorney, submitted a written response on April 1, 1997, and written and oral responses on April 10, 1997. Pet. App. 6a. Shortly thereafter, Colonel Gluski issued a decision terminating petitioner's employment effective April 21, 1997. The decision cited, among other things, petitioner's failure to follow regulatory procedures for acquiring government property and unauthorized use of letterhead. *Ibid.* Following that decision, petitioner sought an administrative hearing, which was held on June

18 and 19, 1997. In his report of findings and recommendations, the hearing examiner concluded that the preponderance of the evidence showed that petitioner had stolen and wrongfully appropriated government property. *Ibid.* The hearing examiner also concluded that petitioner's termination was not arbitrary, capricious or unreasonable. *Ibid.* The Arizona Adjutant General, General Van Dyke, accepted the hearing officer's recommendations on September 12, 1997. *Id.* at 6a-7a.

3. On August 28, 2000, petitioner filed this action in the United States Court of Federal Claims. Pet. App. 7a. Petitioner alleged that his termination was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority, and unsupported by substantial evidence. The complaint asserted that petitioner was entitled to reinstatement, back pay with interest, and a correction of his employment records. Petitioner asserted jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), and the Back Pay Act of 1966, 5 U.S.C. 5596.

The Court of Federal Claims dismissed the complaint, holding that neither the Tucker Act nor the Back Pay Act provided jurisdiction. The Tucker Act, the court explained, waives the United States' immunity to suit and accords the Court of Federal Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding tort." Pet. App. 10a (quoting 28 U.S.C. 1491(a)(1)). The Tucker Act, however, does not itself "create any substantive right enforceable against the United States for money damages." *Ibid.* (quoting *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976)). Consequently, a plaintiff seeking to establish Tucker Act jurisdiction must demonstrate both that he is

asserting one of the causes of action for which the Tucker Act waives immunity, and that he relies on a statute or regulation that can be "fairly interpreted as mandating recovery of compensation from the government." *Ibid.* See also *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (the plaintiff "must demonstrate" that the statutorily-recognized "source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal government for the damage sustained") (internal quotation marks and footnotes omitted).[2]

The Court of Federal Claims concluded that petitioner had not identified an applicable money-mandating statute, regulation, or constitutional provision. Pet. App. 10a-12a. Rejecting petitioner's reliance on the Back Pay Act, the court explained that, under that Act, employees may receive back pay, with interest, when "an appropriate authority" finds "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay." *Id.* at 11a (quoting 5 U.S.C.

[2] In addition to monetary relief, petitioner sought correction of his service records. In general, the Court of Federal Claims has jurisdiction to enter awards of money damages but lacks authority to grant declaratory or injunctive relief. See *Testan*, 424 U.S. at 397-398; *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867); *Bonner* v. *United States*, 76 U.S. (9 Wall.) 156, 159 (1869); *United States* v. *Jones*, 131 U.S. 1, 9, 14-18 (1889). As an exception, 28 U.S.C. 1491(a)(2) accords the Court of Federal Claims authority to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" as "an incident of and collateral to any" money judgment to "provide an entire remedy and complete the relief." The Federal Circuit has concluded that Section 1491(a)(2) allows reinstatement or correction of records only in a case where it is "tied and subordinate to a money judgment." See *James* v. *United States*, 159 F.3d 573, 580-581 (Fed. Cir. 1999). Petitioner does not appear to dispute that 28 U.S.C. 1491(a)(2) does not afford the Court of Federal Claims jurisdiction absent a proper jurisdictional basis for monetary relief under 28 U.S.C. 1491(a)(1).

5596(b)(1)). The Federal Circuit, the court continued, had interpreted the Back Pay Act as a remedial command to be followed when the plaintiff asserts one of the causes of action recognized in the Tucker Act, not as an independent cause of action for money from the government. Consequently, to establish Tucker Act jurisdiction, a plaintiff must show that the challenged personnel action violated a relevant statute or regulation covered by the Tucker Act. Pet. App. 11a. See *United States* v. *Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (no jurisdiction despite reliance on Back Pay Act where plaintiff "failed to show that his separation * * * violated any relevant statute or regulation covered by the Tucker Act"). Here, the court concluded, petitioner had not alleged the violation of such a statute or regulation. *Ibid.*

The Court of Federal Claims also concluded that, following this Court's decision in *Fausto*, the Back Pay Act does not give the Court of Federal Claims "jurisdiction to adjudicate the merits of an underlying personnel action." Pet. App. 12a. The Back Pay Act, by its terms, provides a monetary remedy where "an appropriate authority" finds that the employee suffered wrongful personnel action. This Court's decision in *Fausto*, the court noted, had concluded that, "under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." Pet. App. 12a (quoting *Fausto*, 484 U.S. at 454). Absent a finding of wrongful action by an "appropriate authority" such as the MSPB or the agency itself, the Court of Federal Claims stated, courts asserting Tucker Act jurisdiction lack authority to hear Back Pay Act claims. *Ibid.* Applying that holding here, the court pointed out that there "has not been a determination by an appropriate authority * * * holding that [petitioner's] termination was unwarranted or

unjustified. Indeed, the adjutant general concluded that [petitioner's] termination was proper." *Id.* at 12a-13a.

Finally, the Court of Federal Claims rejected petitioner's claim that, as a National Guard technician, he is "exempt[] from the CSRA, so that *Fausto* does not apply." Pet. App. 13a. The fact that "the CSRA specifically excludes National Guard technicians 'from its channels of administrative and judicial review' * * * does not mean" that petitioner may seek relief under an alternative remedial scheme such as those "in place before the CSRA's enactment." *Ibid.* (quoting *Booth* v. *United States*, 990 F.2d 617, 619 (Fed. Cir. 1990)). The Court of Federal Claims explained that, following *Fausto*, the Federal Circuit had held that "the CSRA expressly denies National Guard technicians judicial review in" the Court of Federal Claims. *Ibid.* (citing *Booth*, 990 F.2d at 620). The CSRA, the Court of Federal Claims explained, "exclusively governs federal personnel matters." *Id.* at 13a-14a. "Because National Guard technicians are excluded from the CSRA's administrative and judicial review options, the only review rights [petitioner] has are to appeal his case to the state adjutant general." *Id.* at 14a.[3]

4. The Federal Circuit affirmed in an unpublished opinion, holding that its earlier decision in *Booth* v. *United States*, 990 F.2d 617, 620 (1993), is controlling. Pet. App. 1a-3a. In *Booth*, the Federal Circuit "held that a National Guard technician employed pursuant to 32 U.S.C. 709 is not entitled to judicial review of an adverse personnel action."

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[3] The Court of Federal Claims rejected petitioner's apparent assertion that the Administrative Procedure Act (APA), 5 U.S.C. 553 *et seq.*, afforded it jurisdiction. Pet. App. 14a-15a. The APA, the court held, "is not a money-mandating statute granting * * * jurisdiction under the Tucker Act." *Id.* at 15a. Further, the court noted, "the APA is not an independent source of jurisdiction for any court." *Ibid.* Petitioner does not, before this Court, renew his claim that the APA provided the Court of Federal Claims with jurisdiction.

Pet. App. 2a. Petitioner, the court noted, "can not distinguish his appeal from the facts and law of *Booth*." *Ibid.* The court also rejected petitioner's invitation to overrule *Booth*. *Booth*, the court explained, "implements the Court's reasoning in *Fausto*," which held that "the CSRA does not include alternate paths of appeal for those few classes of employees for which Congress expressly denied appeal rights to the Merit Systems Protection Board." Pet. App. 2a-3a. The Federal Circuit stated that National Guard technicians were expressly excluded from access to judicial review, but noted that they had been "provided with a system of review within the National Guard structure." *Id.* at 3a. The Federal Circuit thus concluded that the Court of Federal Claims had properly dismissed the complaint for lack of subject matter jurisdiction. *Ibid.*

ARGUMENT

The unpublished decision below is correct and does not conflict with the decision of any other court of appeals. Accordingly, further review is not warranted.

1. Because the United States is entitled to sovereign immunity, it "may not be sued without its consent," and "the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *United States* v. *Testan*, 424 U.S. 392 (1976). When the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). Waivers of immunity, moreover, must be strictly construed in favor of the sovereign. *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

This case concerns the scope of the waiver of immunity contained in the Tucker Act, 28 U.S.C. 1491(a), and the availability of administrative and judicial review under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, as amended by the Civil Service Due Process Amendments Act, Pub. L. No. 101-376, 104 Stat. 461 (1990). Petitioner does not dispute that, in order to fall within the scope of the Tucker Act's waiver, he must *both* assert a claim based on one of the substantive sources of law the Tucker Act identifies—*e.g.*, a claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1)—*and* "demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal government for the damage sustained." *Mitchell*, 463 U.S. at 216-217 (internal quotation marks and footnotes omitted); *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (1967)); see *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against federal agency absent "a waiver of sovereign immunity" and a "source of substantive law [that] provides an avenue for relief"). Petitioner claims, however, that the Back Pay Act provides him with a substantive right to payment. That claim is incorrect.

The Back Pay Act authorizes a monetary remedy of lost wages, plus interest, if it "is found *by an appropriate authority*" that the claimant was "affected by an unwarranted or unjustified personnel action which resulted in a withdrawal or reduction in the pay." 5 U.S.C. 5596(b)(1) (emphasis added). In *United States* v. *Fausto*, 484 U.S. 439, 443 (1988), this Court held that, following implementation of the CSRA, "an appropriate authority would include the agency itself, or the MSPB or the Federal Circuit where those entities have the authority to review

the agency's determination." *Fausto*, 484 U.S. at 454. The Court, however, concluded that the Court of Federal Claims "(and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." *Ibid.*

Petitioner does not claim that an "appropriate authority" such as "the agency itself, or the MSPB" has found that petitioner was subjected to unwarranted or unjustified personnel action. To the contrary, the Arizona Adjutant General, following administrative hearings and review within the agency, concluded that petitioner's dismissal was proper. Pet. App. 12a-13a. Under *Fausto*, that forecloses petitioner's reliance on the Back Pay Act. To the extent petitioner contends that the Court of Federal Claims, exercising Tucker Act jurisdiction, should be permitted to determine that his termination was "unwarranted or unjustified" within the meaning of the Back Pay Act, *Fausto* again forecloses his argument. "[A] court relying on Tucker Act jurisdiction," *Fausto* holds, "is not an 'appropriate authority' to review an agency's personnel determination." 484 U.S. at 454. Section 709(f)(4) of Title 32, moreover, provides that any "right to appeal" enjoyed by National Guard technicians such as petitioner does "not extend beyond the adjutant general."

Petitioner nonetheless asserts that "the inference of congressional intent to preclude judicial review drawn in *Fausto* * * * cannot properly be drawn as to [National Guard] technicians." Pet. 10. But here the inference is considerably stronger than it was in *Fausto*. In *Fausto*, Congress gave certain employees—competitive service employees and preference eligible excepted service employees who had completed one year of service—a right to administrative and judicial review in Chapter 75, but did not mention such rights for nonpreference eligible excepted employees. Relying on *Block* v. *Community Nutrition*

Institute, 467 US. 340, 345-348 (1984), the Court explained that "the omission of review procedures" for one class of affected individuals, "coupled with the provision of such procedures for" others, "was strong evidence that Congress intended to preclude" the former "from obtaining judicial review." 484 U.S. at 447-448. *Fausto* thus held that the "comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that chapter." *Id.* at 448.

Here, Congress did not merely *omit* mention of National Guard technicians from the CSRA provisions for administrative and judicial review. Instead, Congress enacted a statutory provision *expressly excluding* them from the CSRA provisions creating those rights. Thus, while Subchapter II of Chapter 75 of the CSRA establishes the right to administrative and judicial review of adverse personnel decisions such as dismissals, 5 U.S.C. 7511(b)(5) unequivocally declares that "[t]his subchapter," *i.e.*, Subchapter II, "does not apply to an employee * * * who is described in section 8337(h)(1), relating to technicians in the National Guard." Section 7511(b)(5), moreover, was added by the 1990 Civil Service Amendments, which were enacted in response to *Fausto* and with an awareness of *Fausto*'s holding. Further, the 1990 Civil Service Amendments accorded additional categories of employees (those "in the excepted service" "not serving a probationary or trial period" or who "completed 2 years of current continuous service") a statutory right to administrative and judicial review. See 104 Stat. 461 (codified as 5 U.S.C. 7511(a)(1)(C)); pp. 3-4, *supra*. But Congress deliberately

chose not to provide such rights to National Guard technicians. That can only mean that review of such terminations must be precluded under *Fausto*. If Congress's *omission* of a category of employees was persuasive evidence of an intent to withhold administrative and judicial review in *Fausto*, Congress's *express exclusion* of National Guard employees from the provisions authorizing such review in the wake of *Fausto* is conclusive evidence of the same intent here.

Contrary to petitioner's assertions (Pet. 6), that conclusion does not conflict with *DiLuigi* v. *Kafkalas*, 584 F.2d 22 (3d Cir. 1978), *Davis* v. *Vandiver*, 494 F.2d 830 (5th Cir. 1974), *Morris* v. *McCaddin*, 553 F.2d 866 (4th Cir. 1977), and *Chaudoin* v. *Atkinson*, 494 F.2d 1323 (3d Cir. 1974). Those cases predate the CSRA; they predate this Court's decision in *Fausto*; and they predate Congress's enactment of the 1990 Civil Service Amendments. As a result, they have no bearing on Congress's intent in enacting the CSRA or the 1990 Civil Service Amendments, or on the proper application of *Fausto* here. Most of those cases, moreover, involved constitutional challenges brought against individual officers, and many do not even address the issue of jurisdiction.[4] Some, like *DiLuigi*, actually support the

[4] *Chadouin*, *DiLuigi* and *Davis*, for example, were all due process challenges, not statutory claims, and all involved lawsuits filed against individual officers, not against the United States. The standards applied to those categories of claims are not necessarily the same. See *Webster* v. *Doe*, 486 U.S. 592, 604 (1988) (concluding that judicial review of statutory but not constitutional claims was precluded by statute because, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974) (federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent). Neither *Davis* nor *Morris*, moreover, mentions the basis for district court jurisdiction; they thus cannot be considered binding on that issue. See, *e.g.*,

decision below. "Congress," *DiLuigi* observes, "was conscious of the fact that most of the technicians would be in the noncompetitive or excepted category of civil service employment and hence, would not have the benefit of tenure or the procedural protection provided competitive-classified employees." 584 F.2d at 25.

Nor is the court of appeals' decision inconsistent with *Fausto* and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), which recognize the presumption in favor of judicial review. See Pet. 7, 11-12. Here, there is convincing evidence that Congress intended to withhold administrative and judicial review. This Court's decision in *Fausto* found such an intent evident with respect to nonpreference excepted service employees based on the absence of a CSRA provision granting them a right to administrative and judicial review. Here, the intent to withhold review is evident from an express statutory provision, 5 U.S.C. 7511(b)(5), excluding National Guard technicians from the CSRA's administrative and judicial review provisions. See also 32 U.S.C. 709(f)(4) (declaring that any right to appeal "shall not extend beyond the adjutant general of the jurisdiction concerned").

The legislative history of the 1990 Civil Service Amendments confirms what the text makes clear. The House Report demonstrates that Congress, aware of this Court's holding in *Fausto*, intended to provide judicial review rights for certain members of the excepted service otherwise

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Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (internal quotation marks omitted); *United States* v. *Jones*, 225 F.3d 468, 469 (4th Cir. 2000) (earlier decision adjudicating the merits without addressing jurisdictional issue of sovereign immunity not binding on that question when raised in a later case).

covered by *Fausto* but decided to exclude National Guard technicians such as petitioner. H.R. Rep. No. 328, *supra*, at 4. The Committee noted that:

> The bill excludes National Guard Technicians. While the committee is sympathetic to the pleas for better protection the technicians have made, the committee also realizes it shares jurisdiction over these individuals, who are hired under provisions of title 32, United States Code, with the Committee on Armed Services. Rather than delay this legislation to work out legislation acceptable to the Committee on Armed Services, the committee will address the issue of protection for technicians in separate legislation.

Id. at 5. The legislative history also notes that exclusion of national guard technicians is "consistent with section 709(f) of title 32." It is thus clear that Congress could have accorded National Guard technicians a right to administrative and judicial review in the 1990 Civil Service Amendments, but chose not to do so.[5]

2. Petitioner attempts to avoid the effect of the CSRA, this Court's decision in *Fausto*, and the 1990 Amendments to the CSRA, by arguing that Congress intended to *exclude* National Guard technicians from the CSRA altogether. Congress, petitioner argues, intended to leave National Guard technicians free to pursue other remedies. Pet. 12-13. That argument too lacks merit.

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[5] Petitioner suggests (Pet. 7) that he has a constitutionally protected interest in his job, because 32 U.S.C. 709 allows termination "for cause." Petitioner, however, was granted all the process that was due, as the very cases cited by petitioner demonstrate. See, *e.g.*, *Davis*, 494 F.2d at 832 (plaintiff accorded "more than the Constitution required" when he was given "notice of the charges and reasons for removal, * * * the right to reply orally and in writing," and "a full evidentiary hearing after his termination").

As an initial matter, the CSRA "comprehensively overhauled the civil service system." *Fausto*, 484 U.S. at 443 (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985)). "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *Id.* at 444 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978)). Petitioner appears to claim that Congress, contrary to its evident intent, actually sought to *retain* a patchwork of review mechanisms, at least with respect to National Guard technicians.

This Court, in any event, rejected an almost indistinguishable argument in *Fausto*. The respondent there argued that Congress's "exclusion of nonpreference excepted service personnel from Chapter 75" evidenced Congress's intent to "leav[e] them free to pursue other avenues of review," 484 U.S. at 449, including "so-called nonstatutory review," *id.* at 444, 445. The Court, however, concluded that "the absence of provision for these employees to obtain judicial review is not an uninformed consequence of the limited scope of the statute, but rather manifestation of a considered judgment that they should not have statutory entitlement to review for adverse action of the type covered by Chapter 75." *Id.* at 448-449.

The same is true here. Even after *Fausto* was decided, Congress specifically considered and declined to grant administrative and judicial review to National Guard technicians. Congress made that choice even though it granted such rights to other categories of employees, and despite "the pleas for better protection the technicians have made." See pp. 4, 15-16, *supra*. That does not mean that petitioner was without any remedy. As the Federal Circuit recognized, National Guard technicians have been "provided with a system of review within the National

Guard structure." Pet. App. 3a. But petitioner's appeal rights did "not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709(f)(4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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